NO. 78-1771

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRED WEIBEL,

Petitioner,

vs.

EMORY T. CLARK d/b/a THE CLARK BUILDING and THE WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petitioner prays that a Writ of Certiorari issue to review the order of the Supreme Court of the State of Wisconsin entered on February 27, 1979.

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin is set out in the appendix, p. 1.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner denied his right to due process and equal protection under the 14th Amendment because of inadequate notice of the specific act of misconduct.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The petitioner was employed by the respondent The Clark Building in the capacity of building engineer from 1967 until March of 1975. On approximately March 20, 1975 petitioner was discharged from his employment. Petitioner duly applied for unemployment compensation and the employer objected to payment of benefits alleging "misconduct" on the part of the petitioner. Demands for the specific nature of the notice of the "misconduct" alleged were made by petitioner and his counsel. However, no particulars were furnished by either the respondent employer or the Department. On August 8, 1975 a hearing into the claim was held. Petitioner's attorney demanded specifications and notice of the charges and entered appropriate objection to the proceedings. After the presentation of the case of the employer request was made for adjournment in order to prepare a defense to the allegations. The motions for specifications at the commencement of the hearing and the motion for adjournment were denied. The Commissioner denied the claim of the petitioner and determined no benefits were due concluding misconduct on the part of the petitioner of the nature of theft. Administrative remedies were exhausted, judicial review sought in the Circuit Court of Dane County and on December 29, 1976 the decision denying benefits was affirmed. An appeal from that decision was taken to the Supreme Court of the State of Wisconsin and on February 27, 1979 the decision of the trial court was affirmed.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER WAS DENIED SEASONABLE AND ADEQUATE NOTICE AND AN ADEQUATE OPPORTUNITY TO DEFEND THE CHARGES AND THUS DENIED ESSENTIAL DUE PROCESS OF LAW.

The petitioner's interest in unemployment benefits is obviously an interest protected by the due process provisions of both the State and federal constitutions. Since the issue ultimately raised in the proceedings concerned the integrity and reputation of the petitioner the minimum requirements of due process were commanded. *Wisconsin* v. *Constantineau* (1971) 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed. 2d 515; *Board of Regents* v. *Roth* (1972) 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548; *Perry* v. *Sindermann* (1972) 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570; *Wieman* v. *Updegraff* (1952) 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216; *State ex rel De Luca* v. *Common Council* (1976) 72 Wis. 2d 672, 242 N.W.2d 689. In the case of *McKnight* v. *Southeastern Pennsylvania Transport* (1978) 583 F.2d 1229, the Court held that: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard is essential." The fact in *McKnight* were strikingly similar to the case at bar. McKnight was discharged because he was allegedly intoxicated on the job, while petitioner in this case was discharged for allegedly stealing candy. In both instances the parties were deprived of due process because they were not afforded adequate notice of the charges.

In the administrative context, it has been held that "due process requires that interested parties be given a

reasonable opportunity to know the claims of adverse parties and an opportunity to meet them." *Morgan* v. *United States,* (1938) 304 U.S. 1, 18, 58 S.Ct. 773, 776. There are at least three substantial elements required to afford due process at an administrative hearing: 1) the right to seasonably know the charges or the claims preferred; 2) the right to meet such charges or claims by competent evidence and 3) the right to be heard by counsel. If either of these rights is denied a party, he does not have the substantials of a common law hearing. *Ekorn* v. *McGovern* (1913) 154 Wis. 157, 277 et seq., 142 N.W. 595.

No principal of procedural due process is more clearly established than that of notice of specific charge and a chance to be heard. *Cole* v. *Arkansas* (1948) 333 U.S. 202. The notice of the specifics must be furnished sufficiently in advance so that a reasonable opportunity to prepare is afforded. *Re Application of Gault* (1967) 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct. 1428; *Goldberg* v. *Kelly* (1970) 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011; 16 Am. Jur. 2d Const. Law, Chapter 562, pp. 966-968. Accordingly, failure to furnish notice of specifics until the time of the hearing is to furnish no effective notice. If as the facts state, petitioner was discharged because of misconduct, it is doubtful that the information fairly informed him of specificity of the charge and thus he was hindered in trying to establish an adequate defense.

The concept of due process is not merely a procedural safeguard, it affords freedom from arbitrary action. It has been said that the protection from arbitrary action is the essence of substantive due process. *Poe* v. *Ullman* (1961) 367 U.S. 497, 6 L.Ed.2d 989, 81 S.Ct. 1752 and 16 Am. Jur. 2d Const. Law, chapter 550, pp. 946-949, chapter 575, p. 980.

The United States Supreme Court has held that notice and hearing are preliminary steps essential to the passing

of an enforceable judgment, and that they constitute basic elements of the constitutional requirement of due process. *Powell* v. *Alabama,* 287 U.S. 68, 77 L.Ed. 170 (1932). Furthermore, the Court has held that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice *reasonably calculated*, under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306 (1950). It would be idle to pretend that notice of misconduct alone, as prescribed here, is a reliable means of acquainting the interested party with the fact that he was being discharged for stealing candy. The chance of actual notice as further reduced when, as here, petitioner was refused entry into respondent's file. In weighing its sufficiency on the basis of actual notice, one cannot regard respondent's term "misconduct" as adequate notice. It cannot be said that respondent's notice to petitioner was "reasonably calculated" to give petitioner actual notice of the charges.

The requirement of adequate notice is an indispensable jurisdictional requirement that must be satisfied with regard to practical substance not merely mechanical form. *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306 (1950). In the case at bar, the petitioner was only aware that he was discharged for misconduct, this afforded him little practical substance regarding the charges. Practically, petitioner should have had notice of the specific reasons for discharge otherwise petitioner would not be afforded a reasonable opportunity to set up his defenses to the charges. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. *Morgan* v. *United States,* 304 U.S. 1 (1937). The petitioner was

not given a reasonable opportunity to know the claims because he was only given notice of misconduct, not any particular kind of misconduct. Without notice of the specific reason for discharge, the petitioner was prejudiced in attempting to prepare an adequate defense.

When the above principles are applied to the circumstances of the case at bar it is apparent that the petitioner was denied essential due process. It is undisputed that until the morning of the hearing neither he nor his counsel, in the face of demands therefore, were furnished any notice of the specifics or particulars of the "misconduct" charge. A final request for specifics was made at the very commencement of the hearing. Under the circumstances it was impossible for the petitioner to adequately prepare a defense to the charges. In this regard had the petitioner notice of specifics he would have had the opportunity to obtain and present impeachment evidence to demonstrate, for example, that the key witness erred when claiming it was daylight when she made her observations and, since the issue of the incident of March 19, 1975 involved credibility, petitioner might have successfully obtained a stipulation to utilize polygraph evidence.

Here it is significant to note that during the hearing evidence was submitted and apparently considered concerning an alleged course of conduct of theft over a period of years. Since the findings were couched in the same general language—"misconduct"—one cannot determine whether petitioner was "convicted" of one specific verdict or of the course of conduct.

The counter-argument propounded by the respondents on that issue and accepted by the court in its decision was that since the petitioner was also alleged to have made a confession he was not entitled to notice or the failure of

notice was harmless error. Such an argument cannot be accepted in conformity with any established principles. To accept such an argument is to undermine essential presumptions of our jurisprudence. In the case at bar, the "confessions" were also disputed. Even were there no dispute concerning the confessions, the existence of admissions against interest has never been held under either state or federal law as a valid excuse to deny seasonable and adequate notice. *Twinning* v. *New Jersey* (1908), 211 U.S. 78, 53 L.Ed. 97, 29 S.Ct. 14; *Re Application of Gault*, supra and *Goldberg* v. *Kelly*, supra. The Court has been extremely clear that what may not be taken away under the 14th Amendment are notice of the charge and an adequate opportunity to be heard in defense of it. *Powell* v. *Alabama*, supra; *Holmes* v. *Conway*, 241 U.S. 624; *Blackmer* v. *United States*, 284 U.S. 421; *NAACP* v. *Wilmington Medical Center*, 453 F. Supp. 330 (1978).

CONCLUSION

For the reasons stated above certiorari should be granted.

Respectfully submitted,

ROBERT E. SUTTON
Attorney for Petitioner

APPENDIX

APPENDIX 1

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1978

No. 76-455

FRED WIEBEL,
Plaintiff-Appellant,

v.

EMORY T. CLARK d/b/a THE CLARK BUILDING, et al.,
Defendants-Respondents.

Appeal from a judgment of the circuit court for Dane County.
GEORGE R. CURRIE, Reserve Circuit Judge, Presiding.
Affirmed.

OPINION

Fred Weibel, plaintiff-appellant, appeals from a judgment confirming a decision of the Department of Industry, Labor & Human Relations. The ILHR Department found that Weibel was ineligible for unemployment compensation because his discharge from employment as maintenance engineer at the Clark Building resulted from his misconduct.

CONNOR T. HANSEN, J. The issues on appeal are:

1. Whether the department's failure, prior to the hearing, to apprise the appellant of the specific act of mis-

conduct charged by the employer resulted in a denial of due process and prejudice to the appellant?

2. Whether the circuit court erred when ruling on the issue of the department's alleged denial of appellant's request to review the file prior to the hearing?

The appellant was discharged from his employment on March 20, 1975, by Stephen D. Burton, general manager of the Clark Building. The appellant inquired as to the reason for his discharge and Burton told him it was because he had been stealing candy from Heinemann's Restaurant, a tenant in the building.

On May 22, 1975, the appellant and his lawyer appeared before an adjudicator for the department. The appellant addressed this allegation of stealing in a written statement and acknowledged that Burton had told him at the time of his discharge that Levi and Burns, officials of Heinemann's, said the stolen items were candy.

The department denied unemployment compensation in its initial determination on the ground of misconduct. The appellant requested a hearing which was held on August 8, 1975.

At the beginning of the hearing appellant's counsel objected to the proceedings on the ground that, despite requests, appellant had not been informed of the exact nature of the reason for his discharge. He requested that the hearing be adjourned following the presentation of the employer's evidence. The examiner agreed to rule on this motion at that time.

The employer presented evidence that appellant had been discharged for stealing candy of the approximate value of $40 to $50 from a building tenant, Heinemann's Restaurant. Terry Parks, a cook at Heinemann's, testified that on March 19, 1975, about 6 a.m., as she was arriving

at work, she saw appellant, through the restaurant window. She said he was standing at the candy counter near the cash register taking chocolate Easter eggs and stuffing them into his shirt. She said it was daylight and that the lights were on inside the restaurant. She reported the incident to the restaurant manager, Kathleen Hanson. Mrs. Hanson reported the incident to Edward H. Levi. She said the following day appellant came to her, admitted taking the candy, said he was sorry and asked her to get his job back. She said she had talked to him several times previously about taking things and had had his key taken from him at one time.

John Burns, vice-president of Heinemann's, said appellant approached him after he was fired and asked for another chance. He testified appellant's key to the restaurant had been taken away two years before for stealing. Edward H. Levi testified that after Mrs. Hanson notified him of this incident he called Burton, the building's general manager. He said several years before he had asked to have appellant's key taken away, and that appellant came to him several days after he reported this incident to Burton and said he had been fired for stealing candy Easter eggs from the restaurant and that he (Levi) should go to bat for him and get him his job back.

Stephen D. Burton testified he had never confronted appellant about the previous complaints about his stealing but had instead changed the restaurant's locks so his key didn't work. He said Levi called him about this incident and he discharged appellant the following day, and that he told appellant he was being discharged for stealing from Heinemann's.

At the conclusion of the employer's testimony the appellant's counsel again said that he was not ready to proceed because he did not know the nature of the misconduct

prior to the hearing. The hearing examiner denied appellant's motion to adjourn because the testimony indicated that appellant was aware he had been discharged for stealing candy from Heinemann's.

Appellant testified that he had been in the restaurant that morning fixing the counter stools. He said no lights were on in the restaurant. He denied taking any candy. He said Burton told him $40-$50 worth of candy had been stolen; that he didn't know what candy was taken, when or how it was taken or who was supposed to have seen him. He and another maintenance man testified to various occasions on which they had been offered food by the restaurant, and that they had never been told it was wrong to accept these offers.

After this hearing the appeal tribunal decision affirmed the initial determination. The decision was affirmed again on commission review, and the circuit court entered judgment confirming the determination of the department.

Appellant contends that the department's failure to apprise him of the specifics behind the charge of misconduct impaired his ability to meet those charges with competent evidence thus resulting in a deprivation of due process.

It is undisputed that the initial determination and hearing notice informed the appellant that he had been discharged for misconduct. Sec. 108.09 (2)(d), Stats., requires the department to mail each party a copy of its determination. The Wis. Admin. Code Ind-UC 140.05 (2), (3), require the hearing notice to give the time and place of the hearing and to "concisely set forth the issues." The initial determination in this case and the notice of hearing are certainly a most literal compliance with the statutes and the Admin. Code. In many instances they would probably be insufficient to afford the claimant due notice of the charges against him.

This court has recognized that the following due process rights must be accorded in any quasi-judicial administrative action: (1) The right to seasonably know the charges; (2) the right to meet the charges by competent evidence; and (3) the right to be heard by counsel. *State ex rel. Messner* v. *Milw. Co. Civil S. Comm.*, 56 Wis. 2d 438, 444, 202 N.W. 2d 13 (1972). In *Messner* the court said any notice must be reasonably calculated to apprise the party of the action and to afford him an opportunity to present objections. *Id.* However, Messner did not charge the agency there with failing to apprise him of the acts he committed, but of the work rule he violated.

State ex rel. Richey v. *Neenah Police & Fire Comm.*, 48 Wis. 2d 575, 180 N.W. 2d 743 (1970), was cited in *Messner* as a case involving a lack of particularization of the acts charged. In *Richey* the court said a notice which indicated that on a particular date, at a specified time, the party conducted himself in a manner unbecoming a police officer was not vague. The court stated that such a notice did not have to be technically drawn or meet the requirements of a criminal indictment.

In *State ex rel. DeLuca* v. *Common Council,* 72 Wis. 2d 672, 242 N.W. 2d 689 (1976), the court said a minimum due process requirement was timely and adequate notice of the reasons for discharge. The charge in *DeLuca* enumerated 16 separate items which the appellant answered prior to the hearing. The court said this answer was strong evidence of his ability to respond to the charges. The court further stated that the appellant had made no attempt to show that his ability to defend himself had been impaired by the insufficiency of the charges.

The United States Supreme Court has held that the right to be heard has little meaning unless one is given adequate notice of the charges to be considered at the hear-

ing. *Walker* v. *Hutchinson*, 352 U.S. 112, 115 (1956); *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). In *Morgan* v. *United States*, 304 U.S. 1 (1937), the Court said a notice must do more than just inform a party that a hearing is scheduled:

> ". . . The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." *Id.* at 18, 19.

The due process requirements set out in *Morgan* were adopted by this court in *Folding Furniture Works* v. *Wisconsin L. R. Board*, 232 Wis. 170, 191, 285 N.W. 851, 286 N.W. 875 (1939).

In *Keller* v. *Fochs*, 385 Fed. Supp. 262 (E.D. Wis. 1974), a case involving a student who had been expelled, the court said, at page 265:

> ". . . Even in that situation wherein a student unequivocally admits the conduct charged at an expulsion hearing, and procedural protections thus serve a more limited function in terms of insuring a fair and reliable determination of the retrospective factual question of guilt of the conduct charged, the Seventh Circuit Court of Appeals will look to the existence of adequate notice of the charges and sufficient opportunity to prepare for the hearing on review of alleged due process violations. Betts v. Board of Education of City of Chicago, 466 F. 2d 629, 633 (7th Cir., 1972). . . ."

In *Betts* the court said that even where the party unequivocally admitted the misconduct she had a right to present a mitigative argument with regard to the punishment imposed. The court then found that the plaintiff there had received adequate notice of the charges and had sufficient opportunity to prepare for the hearing.

Applying the foregoing standards and precedents to the instant case, the record reflects that the initial determination by the deputy and the subsequent notice of the hearing stated that the appellant had been denied unemployment compensation because of "misconduct" and that such was the issue at the hearing.

We agree with the finding of the trial court which stated:

> "If this were the entire record with respect to apprising the employee of the charges against him which were claimed to be misconduct, the Court would without hesitation determine there was a denial of due process. But this is not the entire record."

Despite the apparent inadequacy of the notice the appellant can only prevail if he shows that he has been prejudiced as a result of such notice.

The scope of review of unemployment compensation decisions is defined by statute. Sec. 108.09 (7) (b), Stats., limits the scope of review to questions of law and adopts the judicial review provisions of chapter 102. Sec. 102.23 (2), provides that the court may set aside a department order only if the department has acted in excess of its powers, the order has been procured through fraud or the findings of fact do not support the order. A proceeding conducted in disregard of procedural safeguards has been held to be an action in excess of the department's powers.

State ex rel. Madison Airport Co. v. *Wrabetz*, 231 Wis. 147, 155, 285 N.W. 504 (1939). However, sec. 102.23 (2) says:

> "*(2)* Upon the trial of any such action the court shall disregard any irregularity or error of the department unless it be made to affirmatively appear that the plaintiff was damaged thereby."

The appellant has the burden of showing he has been prejudiced by the department's action. *Theodore Fleisner, Inc.* v. *ILHR Department*, 65 Wis. 2d 317, 329, 330, 222 N.W. 2d 600 (1974); *Kessler* v. *Industrial Comm.*, 27 Wis. 398, 403, 134 N.W. 2d 412 (1965); *Gallagher* v. *Industrial Comm.*, 9 Wis. 2d 361, 368, 101 N.W. 2d 72 (1960); *Folding Furniture Works, supra,* at 191.

The department found, based on the written statement signed by appellant when he filed his claim and on the testimony given at the hearing, that appellant knew he had been fired for stealing candy from Heinemann's. The department and the circuit court concluded that appellant could not be prejudiced by the department's failure to apprise him of something he already knew.

The department's findings of fact are conclusive on review where they are supported by any credible evidence on the record as a whole. *McGraw-Edison Co.* v. *ILHR Department*, 64 Wis. 2d 703, 709, 221 N.W. 2d 677 (1974). The finding that appellant knew he had been fired for stealing candy from Heinemann's is amply supported by the evidence, including his own testimony and the written statement he filed with his application for benefits. Clearly appellant was not prejudiced by the department's failure to notify him of this much.

The only question that remains is whether he was prejudiced by the department's failure to tell him, in advance of the hearing, who saw him take the candy and when. In

Fleisner, supra, at 330, this court said in order to determine whether the party was prejudiced it had to know what evidence he would have offered. Appellant contends he could have produced impeachment evidence as to whether it was daylight when Miss Parks saw the appellant. As the circuit court correctly pointed out, lighting outside the restaurant was not important, lighting inside was. Appellant also contends that if he had known the hearing would turn on credibility he could have obtained a stipulation to use polygraph evidence. The appellant knew he was accused of stealing the property of Heinemann's and his defense was a denial of the charge. Obviously the issue at all times was one of credibility. There is no indication in the record that appellant ever offered to take a polygraph exam, or that the employer or the department would have agreed to such a procedure.

At the commission and circuit court levels appellant had the advantage of having heard the employer's entire case yet he failed to point to a single piece of material evidence he was prevented from producing as a result of the insufficient notice. Appellant was prepared for the hearing to the extent that he was able to explain why he was in the restaurant that morning, state that the lights were off and deny that he passed Miss Parks on the steps that morning. He was able to relate, in detail, earlier incidents in which Heinemann's employees had offered him milk or coffee. His counsel presented another witness who testified about being offered food. It appears appellant was well prepared to defend this particular incident of misconduct. The only thing he didn't know in advance was who saw him. There is no due process right which requires the commission to list the witnesses in the notice of hearing.

Appellant also contends that the department denied him access to its file prior to the hearing. The appellant contends that the circuit court erred in its ruling on this case.

At the hearing appellant's counsel made no mention of an attempt to review the department's file. The first mention of such an attempt was made in the complaint filed with the circuit court in January, 1976, which alleged:

> "7. Although due demand was made said examiner failed and refused to inform the Plaintiff prior to said hearing of the underlying basis of the employer's allegations contrary to IND. U.C. 140.05 (3)(4) Wisconsin Administrative Code, Sec. 227.07, 227.08, 227.09, 227.10 Wisconsin Statutes; and the Fifth Amendment of the Constitution of the United States as made applicable through the Fourteenth Amendment of the Constitution of the United States."

This allegation in the complaint filed in the circuit court is supported by an affidavit of law partner of counsel for appellant. This affidavit, dated November 2, 1976, states that several days prior to the hearing he observed appellant's counsel call the hearing examiner and request a list of witnesses, the name of opposing counsel and the department's file. He stated that these requests were refused.

In response to this allegation in the complaint an affidavit of the hearing examiner was filed with the circuit court which stated that he had no recollection or record of a telephone call from appellant's counsel requesting information about the case prior to the hearing. He also stated that he always followed department policy in allowing parties to review the file.

The circuit court refused to consider this issue, explaining:

> "The case of *State ex rel. Madison Airport Co.* v. *Wrabetz*, supra, sets forth the proper procedure to be followed in a situation of this kind where an issue of procedural due process is asserted with respect to facts that do not appear in the record in a worker's compensation, or unemployment compensation, proceeding. That procedure is for the reviewing court to take evidence on the issue. However, this Court does not perceive it to be its duty to do this in the absence of any request made prior to the hearing that it do so. No such request was made. The Court does not deem it would be proper to try such an issue by affidavits. Therefore, the Court declines to consider the issue of whether plaintiff's counsel requested an opportunity to inspect the file and such request was denied."

There is no statute or regulation requiring the department to allow the parties to review the file. Assuming that appellant was refused access to the file the ultimate issue would be the same: Was he prejudiced by the department's error? If appellant's counsel had viewed the file prior to the hearing he would have been able to read a letter from the employer which gave the date and time (6 to 8 a.m.) of the incident and Miss Parks' name. For the reasons stated above, appellant has not shown that he was prejudiced by not being given this information prior to the hearing.

Wrabetz, supra, involved an allegation that the commission members had ruled without reading the hearing transcript or otherwise considering the evidence it contained. Obviously if this allegation was true the plaintiff would be prejudiced by such an agency action. This court there held that it would be necessary for the trial court to take evidence on the issue. This is not such a case.

The general rule is that, in the absence of fraud, evidence will not be taken in the circuit court when reviewing

the department's orders. *International Harvester Co.* v. *Industrial Comm.*, 157 Wis. 167, 172, 147 N.W. 53 (1914). A party is precluded from offering evidence he failed to offer before the commission. *Id.* The department's alleged failure to allow appellant's counsel to review the file prior to the hearing was not mentioned at the hearing or before the commission.

The circuit court did not err in refusing to further consider this issue.

By the Court:—Judgment affirmed.

APPENDIX 2

MEMORANDUM DECISION

(Formal Portions Omitted)

Before: Hon. George R. Currie, Reserve Circuit Judge

This is an action by the plaintiff employee to review a decision of the defendant department dated December 19, 1975, entered in an unemployment compensation proceeding which adopted the findings of fact of the appeal tribunal, denied the employee's request for a further hearing, and affirmed the appeal tribunal's decision. The appeal tribunal's decision determined that the employee had been discharged in week 12 of 1975 for misconduct connected with his employment within the meaning of sec. 108.04(5), Stats., and held the employee was ineligible for benefits.

The evidentiary findings of fact made by the appeal tribunal read:

> "The employe worked for approximately ten years as a building engineer for the employer, a commercial and office building. His last day of work was March 19, 1975 (week 12).
>
> "On his last day of work, the employe was observed taking candy easter eggs from a counter on the premises of one of the employer's tenants. The store was closed at the time and he did not have permission to take the candy eggs. The employer's manager was informed of the theft and the employe was subsequently discharged on March 20, 1975 (week 12).
>
> "The employe maintained that he did not take the candy easter eggs. However, he was observed taking the eggs and putting them inside his shirt. He sub-

sequently admitted to several representatives of the employer's tenant that he had in fact taken the eggs.

"Under the circumstances, the actions of the employe in taking property from one of the employer's tenants without permission, evinced a wilful, intentional and substantial disregard of the employer's interests and of the standards of conduct that the employer had a right to expect of him."

The employer referred to in the above quoted findings of fact was the defendant Emory T. Clark d/b/a The Clark Building. The tenant referred to in such findings of fact was Heinemann's which operated a restaurant on the ground floor of the employer's building, which was known as the Clark Building.

THE ISSUES

The issues raised by the plaintiff's original brief and reply brief are:

(1) Was the employee denied due process?

(2) Are the findings of fact with respect to the taking of the candy Easter eggs without permission by the employer sustained by credible evidence?

No issue is raised with respect to whether the appeal tribunal and the department applied the proper test of what constitutes misconduct within the meaning of sec. 108.04(5), Stats., when it was found that the described actions of the employee "evinced a wilful, intentional and substantial disregard of the employer's interests and of the standards of conduct that the employer had the right to expect of him." There is no doubt but what the taking of a tenant's property without permission, regardless of whether the value was slight, would constitute a wilful disregard of the employer lessor's interests.

THE COURT'S DECISION

A. The Due Process Issue.

Sec. 108.09(7), Stats., provides that judicial review of department decisions in unemployment compensation proceedings are governed by sec. 102.23, Stats. While none of the three grounds for review under sec. 102.23(1), Stats., specifically mentions denial of due process, it has long been held that a denial of a fair hearing constitutes a denial of due process and is an action of the department in excess of its powers reviewable under this statute. *State ex rel. Madison Airport Co.* v. *Wrabetz* (1939), 231 Wis. 147, 155, 285 N.W. 504.

The principal reason advanced in support of the contention that the employee was denied due process is because the notice of the hearing before the appeal tribunal did not advise him of the nature of the misconduct with which he was charged.

The department's deputy had under date of June 4, 1975, mailed to the employee his initial determination which read:

"The record supports the employer's allegation that the claimant was discharged for misconduct connected with his employment."

The employee by letter dated June 10, 1975, appealed to the department from the deputy's initial determination. The subsequent notice of the hearing before the appeal tribunal merely stated the issue to be heard at the hearing to be "Misconduct".

If this were the entire record with respect to apprising the employee of the charges against him which were claimed to be misconduct, the Court would without hesitation determine there was a denial of due process. But this is not the entire record.

At the hearing counsel for the employee offered into evidence the employee's written statement dated May 22, 1975, on department form UC-O-157 (Exhibit 1) which he had given to the local unemployment office in connection with his claim for unemployment compensation. In this statement the employee stated: On March 21, 1975, he had a conversation with Burton (the employer's manager of the Clark Building who that day discharged the employee); and Burton told the employee he had had a conversation with Levi and Burns, managers of Heinemann's, and they had stated that the employee had been seen stealing candy from the restaurant "to the amount of $40 or $50 worth".

This establishes that prior to the deputy's initial determination that the charged misconduct was the stealing of candy. While this statement did not indicate the date of the candy theft, the conversation with Burton reported therein was but two days subsequent to the date of the actual taking of the candy as established by the testimony of the eye witness Terry Parks, whose testimony was believed by the hearing examiner sitting as an appeal tribunal. A finding was made that the candy was taken by the employee on March 19, 1975. There could be no possible prejudice to the employee of the failure of the notice to apprise him of a fact he already knew. In order to secure a reversal and remand for a denial of due process in an agency review proceeding the denial must have prejudiced the party asserting the denial.

Two subsidiary issues of due process are also raised in the plaintiff's briefs.

One has to do with the denial of the request for adjournment made by plaintiff's counsel at the hearing, and the other is a claim that plaintiff's counsel was denied a request to inspect the department's file in this matter made

on or about August 4, 1975. The hearing was held August 8, 1975.

At the commencement of the hearing the employee's counsel objected that the notice of hearing had not apprised the employee of the nature of the misconduct for which he was discharged and that he therefore did not have an adequate opportunity to prepare his defense. It was then agreed that the employer would put in his case and then agreed that the employee would move for an adjournment. After the testimony of the employer's witnesses had been taken, this transpired (Tr. 58-59):

> "Mr. Liska: I am not ready to proceed with my case at this time for the same reasons which I have stated earlier.
>
> The Examiner: Well, what do you mean; why aren't you ready to proceed?
>
> Mr. Liska: Because I didn't know the nature of what the misconduct was until 10:10 this morning, I can't fairly and adequately make an investigation on the basis of the testimony elicited today until I have some more time.
>
> The Examiner: Well, I'm going to deny your motion. There has been testimony that Mr. Weibel was aware that he was discharged for stealing candy eggs from Heinemann's; and I don't know how you can be any more specific than that. Your motion is denied."

The testimony referred to by the examiner was that given by Mrs. Hanson and Levi that the employee had admitted to them the stealing of the candy Easter eggs. The Court determines there was no abuse of discretion in the examiner denying the motion for adjournment, and certainly no denial of due process.

In support of the claim that plaintiff's counsel had been denied access to the department's file in the matter a few days prior to the hearing by the hearing examiner, there is attached to plaintiff's reply brief the affidavit of Attorney Theuerkauf, an associate of Attorney Liska. In opposition the department has attached to its brief the affidavit of the hearing examiner. There is nothing in the record returned to this Court with respect to any request to inspect the file or denial thereof.

The case of *State ex rel. Madison Airport Co.* v. *Wrabetz,* supra, sets forth the proper procedure to be followed in a situation of this kind where an issue of procedural due process is asserted with respect to facts that do not appear in the record in a worker's compensation, or unemployment compensation, proceeding. That procedure is for the reviewing court to take evidence on the issue. However, this Court does not perceive it to be its duty to do this in the absence of any request made prior to the hearing that it do so. No such request was made. The Court does not deem it would be proper to try such an issue by affidavits. Therefore, the Court declines to consider the issue of whether plaintiff's counsel requested an opportunity to inspect the file and such request was denied.

B. Whether the Findings of Fact With Respect to the Employee Having Taken Candy Easter Eggs without Permission Are Supported by Credible Evidence.

The employee possessed a key which enabled him to enter Heinemann's restaurant at will. There is no question from the evidence but what he was in the restaurant between 6:00 and 6:30 a.m. on March 19, 1975. He testified that he was then there to make a minor repair to a stool at a counter which had a protruding nail, and that he did not take any candy.

Terry Parks, who was employed in the restaurant kitchen, testified that as she was coming to work that morning at about 6:00 o'clock she observed through the window the employee standing by the cash register taking candy Easter eggs and shoving them into his shirt and saw him do this two or three times. Ms. Parks estimated that the distance then separating her from the employee was about 15 feet, and stated that the lights were on inside the restaurant and it was light outside. She further testified she reported this incident to Mrs. Hanson, the manager of the restaurant, which was corroborated by Mrs. Hanson in her testimony.

Mrs. Hanson further testified: After March 19, 1975, the employee "came" and admitted to her that he had taken the candy Easter eggs and he knew it was wrong. He asked Mrs. Hanson to please go to Mr. Burns and Mr. Levi (officers and co-owners of Heinemann's) and get the employee's job back for him.

When questioned as to the date of this conversation, Mrs. Hanson stated it had to be the following day [to March 19, 1975]. However, the employee had not been discharged by Burton, Clark's building manager, until either March 20th or March 21st, so that Mrs. Hanson may have been in error as to this conversation having taken place on the day following the taking of the candy eggs.

Levi testified: On March 19, 1975, Mrs. Hanson had called him and reported what Terry Parks had seen the employee do. Levi then called Burton and reported this story to him. About two or three days after March 19, 1975, he had a conversation with the employee who told him, "I've been discharged for stealing some candy Easter eggs from you people and you've got to go to bat for me and get my job back from Mr. Burton." Levi then asked the employee "Why would somebody with your pay take this?" and the employee's response was, " I didn't

need it, I really don't like candy; but I give it to the kids in the alley back of my house" (Tr. 37-38).

An attack on the credibility of Ms. Parks has been made on the ground that she testified it was light outside the restaurant at about 6 o'clock on the morning of March 19th and it is claimed the sun did not rise until 7 o'clock a.m. that day. The time when the sun rose that day was not brought out in the record. This Court as a matter of law cannot hold that the testimony of Ms. Parks about seeing the taking of the candy eggs was incredible because she may have been mistaken that it was light outside the building at that time. The important light was not that outside the building but the light inside, and she testified the lights inside were then on. Furthermore, her testimony as to what she saw the employee do was corroborated by the testimony of Mrs. Hanson and Levi by the admissions the employee made to them.

There was ample credible evidence to support the finding made that the employee took the candy Easter eggs on March 19, 1975.

The other material finding of fact attacked is that the employee "did not have permission to take the candy eggs."

The employee testified to services he had performed for Heinemann's in fixing their garbage disposal and water heater controls, regularly changing their soda water dispenser tanks, and putting in lights above their hot plates. On cross-examination the employee was asked these questions and gave these answers (Tr. 70):

> "Q. Anybody at Heinemann's ever tell you in exchange for these services that you had performed that you could take chocolate eggs?
>
> A. No.

> Q. Anyone at Heinemann's ever tell you that you can have anything other than a cup of milk or a cup of coffee?
>
> A. They—They haven't, but they've offered me food various times."

This above quoted testimony by the employee is sufficient in itself to constitute credible evidence to support the finding made that the employee did not have permission to take the candy eggs.

The employee at no time in his testimony claimed he took the candy eggs because of any permission from Heinemann's. Instead, he flatly denied he took them.

The Court is unable to perceive any significant materiality to the testimony of the one witness Hodges who was called to testify in plaintiff's behalf. Hodges was a janitor for both Clark and Heinemann's. He testified that Burns, one of the co-owners of Heinemann's, told him he could have a cup of coffee and doughnuts free in return for his keeping a certain glass door of the restaurant clean.

Let judgment be entered confirming the department's decision which is the subject of this review.

Dated this 29th day of December, 1976.

By the Court:

/s/ George R. Currie

Reserve Circuit Judge

APPENDIX 3

COMPLAINT

(Formal Portions Omitted)

The above-named Plaintiff by his attorney, Harry W. Theuerkauf, alleges that:

1. Plaintiff Fred Weibel is an adult residing at 1220 South 36th Street in the City and County of Milwaukee, Wisconsin, and is by occupation a building engineer.

2. Defendant Emroy T. Clark is an adult resident of the City and County of Milwaukee doing business as "The Clark Building" at 633 West Wisconsin Avenue, in the City and County of Milwaukee, Wisconsin.

3. At all times material hereto, Defendant Emory T. Clark was the employer of the Defendant.

4. Heretofore Plaintiff filed a claim for unemployment compensation with the Industry, Labor and Human Relations Commission of Wisconsin at its Milwaukee office commencing with the week ending March 22, 1975.

5. On or about June 4, 1975 the Wisconsin Industry, Labor and Human Relations Commission by its deputy for Unemployment compensation determined that Plaintiff had been discharged for misconduct and denied Plaintiff's claim for unemployment compensation; that a copy of said determination is attached hereto marked Exhibit A, and made a part hereof as though fully set forth; that although demand was made, said deputy failed and refused to inform Plaintiff of the underlying basis for the employer's allegation contrary to IND U.C. 140.05(3)(4) Wisconsin Administrative Code, Sec. 227.07, 227.08, 227.09, 227.10 Wisconsin Statutes; and the Fifth Amendment of the Constitution of the United States as made applicable through

the Fourteenth Amendment of the Constitution of the United States.

6. Pursuant to timely demand for review, a copy of which is attached hereto marked Exhibit B and made a part hereof as though fully set forth, Plaintiff appealed the decision of said Commission Deputy and hearing was held thereon on August 8, 1975 before John D. Winderl, Appeal Tribunal Examiner.

7. Although due demand was made said examiner failed and refused to inform the Plaintiff prior to said hearing of the underlying basis of the employer's allegations contrary to IND. U.C. 140.05(3)(4) Wisconsin Administrative Code, Sec. 227.07, 227.08, 227.09, 227.10 Wisconsin Statutes; and the Fifth Amendment of the Constitution of the United States as made applicable through the Fourteenth Amendment of the Constitution of the United States.

8. Pursuant to the aforementioned hearing and on August 28, 1975, the Appeal Trial Tribunal by John D. Winderl made a decision based on certain findings of Fact, a copy of which is attached hereto, marked Exhibit C and made a part hereof as though fully set forth, denying the unemployment compensation benefits to which Plaintiff is justly entitled.

9. Pursuant to timely demand, a copy of which is attached hereto and marked Exhibit D and made a part hereof as though fully set forth, Plaintiff appealed the aforementioned decision to the Industry, Labor and Human Relations Commission for its review; that as a result of said review, the aforementioned Commission affirmed the decision of the appeal tribunal; that a copy of said decision is attached hereto marked Exhibit E, and made a part hereof as though fully set forth.

10. The decision of the Industry, Labor and Human Relations Commission is in error, unreasonable, arbitrary,

unlawful, unconstitutional, and contrary to the evidence; that the Commission acted without and in excess of the power to act under the circumstances in that the failure of the Commission to provide the Plaintiff with adequate notice of the nature or extent of the charges against him prior to a determination of Plaintiff's right to benefits in violation of the Wisconsin Administrative Code, the Wisconsin Statutes, the Wisconsin Constitution, and the Constitution of the United States; and further that the decision is contrary to the uncontroverted evidence and the law of the State of Wisconsin.

WHEREFORE, the Plaintiff prays that the Circuit Court will grant a judicial review of the entire record and proceeding with respect to the unemployment compensation claims of Plaintiff and that the Court will require the said Department of Industry, Labor and Human Relations to certify and file with the Court all documents and papers, transcripts, and all testimony taken in said matter at a hearing of said cause before the Court, and that the Court adjudge that the findings, conclusions, rulings and procedures of the Commission herein are unconstitutional, arbitrary, incorrect, unlawful, and contrary to the evidence and the Plaintiff demands judgment that the said decision denying benefits to the Plaintiff be set aside, and the Plaintiff have such other and further relief as the Court may deem just and equitable under the circumstances.

A member of the firm of
Harry W. Theuerkauf
4447 North Oakland Avenue
Milwaukee, Wisconsin 53211
961-0800

APPENDIX 4

June 10, 1975

Department of Industry, Labor
and Human Relations
Employment Security Division
Investigating Office
2778 South 35th Street
Milwaukee, Wisconsin 53215

Re: Fred Weibel

REQUEST FOR APPEAL

Dear Sirs:

This is to inform you that I request an appeal in the decision of Deputy Larry Sorenson on June 4, 1975 regarding my claim for unemployment compensation. I request an appeal for the following reasons:

1. That I was neither given an opportunity to confront nor question my adversaries.

2. That the findings and determinations of the deputy are erroneous in each and every respect.

3. That I am justly entitled to unemployment compensation benefits as per my every claim and request.

Kindly acknowledge receipt of this request for appeal on the enclosed postcard and return to me.

Yours truly,

/s/ Fred Weibel
Fred Weibel

FW:da
Enclosures